Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
Petition for Reconsideration and Clarification of the Fifth Circuit Remand order of BellSouth Corporation	)	

PETITIONER MARTHA SELF'S REPLY TO AT & T INC.'S OPPOSITION TO PETITION FOR RECONSIDERATION AND CLARIFICATION OF MARTHA SELF

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INTRODUCTION

AT & T, Inc., the parent corporation of what was once known as BellSouth Mobility, Inc., (BMI), has filed an opposition to Self's Petition for Reconsideration, arguing that it should not be considered by the FCC because it is time barred. AT & T also, in what can only be described as a 180 degree shift from its prior posture, argues that the Commission was correct in holding that the decision of *TOPUC* was to be applied prospectively as to all parties, despite the fact that *TOPUC* held that the FCC exceeded its jurisdiction when it created a USF schools and library fund contribution basis that included intrastate revenue.[1]

The bare facts could not be more clear that the FCC exceeded its jurisdiction in including

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[1] *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 447-448 (5th Cir. 1999) ("The FCC then contends that § 254 does apply to intrastate matters because it unambiguously authorizes the agency to develop universal service mechanisms that are sufficient to support both interstate and intrastate service. In support of this assertion, the agency points to § 254(d)'s requirement that [e]very telecommunications carrier that provides interstate telecommunications services shall contribute...to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The FCC then compares this language to § 254(f) which allows states to adopt universal service regulations as long as they do not "rely on or burden Federal universal service support mechanisms." This language, the FCC claims, shows that Congress intended for it to bear the primary responsibility for ensuring the sufficiency of universal service for both interstate and intrastate services.

These two provisions do not reflect enough of an unambiguous grant of authority to overcome the presumption established by §2(b). While under Chevron step-two, we usually give the agency deference in its interpretation of ambiguous statutory language, the Supreme Court continues to require the agency to overcome the §2(b) statutory presumption with unambiguous language showing that the statute applies to intrastate matters. See *Iowa Utilities*, 119 S.Ct. At 731. ...**Without a finding that §254 applies, the FCC has no other basis to assert jurisdiction because Iowa Utilities expressly prohibits FCC jurisdiction over intrastate matters stemming from the agency's plenary powers. See *Id.* Therefore, we reverse that portion of the Order that includes intrastate revenues in the calculation of universal service contributions.**" (Emphasis added)

intrastate revenue in its calculation of the schools and libraries USF rate.[2] Therefore, the rate charged to carriers that included an intrastate cost recovery basis was too high. The carriers then passed this rate on to their customers, thereby taking from their customers more money than they were allowed to take. Self seeks a refund of this money from AT & T.[3]

Self does not dispute the fact that wireless carriers such as BMI were allowed to recover USF assessments through all of their services, however, BMI simply took too much money. Take the following simple example:

The FCC determines that BMI owes $100 for its USF schools and libraries payment, based on all revenue of BMI, including intrastate revenue. Without including intrastate revenue, as mandated by *TOPUC*, the proper calculation would have been $80. BMI subsequently collects $100 through assessments based on all of their revenue. The problem is not how BMI collected the money, the problem is that BMI collected too much money, $100, rather than $80. The difference is due to be refunded to the customers who were overcharged. This is the basis of Self's federal law claims.

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[2]See language quoted directly from *TOPUC*, *supra*, note 1.

[3]AT & T clearly reaps a windfall here as it took the money from its customers and passed it along to USAC, thereby avoiding paying the money itself.

DISCUSSION

I. Self's Petition for Reconsideration is not Untimely

§405 of the Act allows **any person aggrieved** by an order of the FCC to petition for reconsideration of that order. The FCC held in its order applying the *TOPUC* mandate that new rules regarding the assessment of the schools and libraries USF fund, eliminating intrastate revenues from the calculation basis, would be applied prospectively only.[4]

BMI timely filed a petition for reconsideration of the FCC's order, arguing that Supreme Court precedent demanded a refund of those monies unlawfully assessed by the FCC.[5] Obviously, BMI did not file the Petition for Reconsideration out of any altruistic motive, rather it was attempting to protect itself from liability to the class represented by Self in the event of an adverse judgment. BMI admitted as much in its Petition.

At the time (November 1999), Self was not aggrieved because she maintained the position that any action taken by the FCC was between the FCC and BMI only, and said action did not have any effect on Self, as the representative of a class of persons aggrieved by the actions of BMI. Further, any filing with the FCC by Self would have been redundant, as BMI placed the salient issues before the FCC in its well argued Petition for Reconsideration and Clarification.

Subsequently, the District Court where Self's action is pending decided to stay the case under the doctrine of primary jurisdiction, in order to see how the FCC would rule on BMI's petition.[6]

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[4]*Fifth Circuit Remand Order*, ¶ 18, Oct. 8, 1999.

[5]Petition for Reconsideration and Clarification of BellSouth Corporation, filed December 6, 1999.

[6]*Martha Self v. BellSouth Mobility*, 111 F.Supp.2d 1169, 1173 (N.D.Ala. 2000).

Therefore, until the FCC ruled on BellSouth's petition, Self was not aggrieved by any action of the FCC, as the issue of reconsideration of prospective applicability of the *TOPUC* mandate was already placed before the FCC by BMI.

As stated in Self's original Petition for Reconsideration, after the FCC's ruling in its Order on Reconsideration on April 9, 2008, the District Court entered an opinion on cross motions for summary judgment, relying in part on the FCC's order in holding that some of Self's claims are preempted by the FCC's continued application of the *TOPUC* mandate prospectively only. Thus, the FCC's Order on Reconsideration caused Self, and the class of customers she purports to represent, to be aggrieved because it directly influenced the District Court's adverse decision. Therefore, Self timely filed a Petition for Reconsideration of the Order.

The reason for the delay in time between the FCC's Order on Remand in October of 1999, and Self's petition for Reconsideration lies at the feet of the FCC. The FCC did not issue any ruling on that portion of BMI's Petition regarding retroactive application of *TOPUC* until April 9, 2008. It is disingenuous for AT & T to argue that Self was dilatory, when AT & T knows full well that all of the parties in the collateral class action lawsuit have been waiting on the FCC for almost ten years. After the FCC's ruling, the District Court issued its opinion, relying on same, and causing Self to be aggrieved. Therefore, Self's Petition for Reconsideration and Clarification is timely, and must be acted on by the FCC.

CONCLUSION

It does not surprise Self that AT & T now takes a position completely opposite to that of its prior stance regarding retroactive application of *TOPUC*. It has been clear from the very beginning that AT & T has attempted to use the FCC not to advance the public interest, but rather to protect itself from legal liability for its actions taken in collecting USF monies. AT & T does not want reconsideration of the Commission's April 9, 2008 Order, because as the Order stands without further clarification, it insulates AT & T from liability for wrongfully obtaining money it was not entitled to.

The Commission should not be duped into becoming AT & T's unwitting pawn in assisting its attempt to avoid its obligation to refund monies illegally obtained from the public. This Commission is appointed to serve and protect the public through carrier regulation. The tail should not wag the dog. AT & T's objection is based on its own self interest rather than a legitimate consideration of the substantive issues raised in the Commission's Order on Reconsideration. Regardless of the Commission's decision on the merits of Self's Petition, Self should at least be given an opportunity to be heard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served on the following counsel of record via United States mail, this the 25 day of June, 2008:

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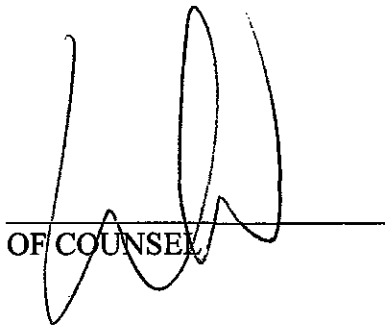

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